JUN 22 1944
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IN THE

Supreme Court of the United States

October Term 1943

No. 183

CONRAD MARINO and GABRIEL VIGORITO,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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CASES CITED

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

A

Summary Statement of the Matter Involved.

By an indictment filed in the United States District Court for the Eastern District of New York on March 23, 1943, the petitioners were charged with the possession and transportation of distilled spirits in containers which did not bear stamps denoting payment of Internal Revenue taxes (26 U. S. C., Sec. 2803(a)). The statute does not forbid such possession or transportation of spirits not intended for sale or manufacture of an article intended for sale (Sec. 2803(a)(6)).

It was proved at the trial that on December 26, 1942, agents of the Alcohol Tax Unit found in the back seat of an automobile occupied by the petitioners, a five-gallon can,

containing about three and one-half or four gallons of alcohol (R. 24). The can was in a paper carton; both can and carton had been previously used, and were dirty (R. 16, 17, 24). The alcohol contained particles of rust (R. 29).

In explanation of their possession, the petitioners offered proof that they had obtained the alcohol an hour or so before the seizure, to be used as an anti-freeze in trucks which they operated. It was obtained from a man named Feoto, who testified to the circumstances.

Feoto said that he had found the can in cleaning the basement of an unoccupied garage where he was temporarily employed. It contained radiator alcohol, as he thought, and he offered it as radiator alcohol to the plaintiffs (R. 33, 34). They paid him $2.50 for it, approximately eighty cents a gallon (R. 41).

The transaction was a casual one, and the petitioners testified that they had not opened the can nor examined its contents between the time when Feoto first produced it and placed it on the back seat of the automobile, and the time when it was opened by the Government agents, about an hour later (R. 40, 42).

The respondent offered no proof in rebuttal. There was no contradiction of Feoto's testimony, nor that of the petitioners. Feoto is a brother-in-law of the petitioner Vigorito; except for this relationship he was a disinterested witness. He has never been indicted for his own admitted possession and sale of the alcohol. There was not even a suggestion in the evidence that the petitioners were or ever had been engaged in the traffic of liquor, licit or illicit.

The theory upon which the case was submitted to the jury was that there was an issue of veracity, because of a discrepancy between this testimony and the explanation made by Vigorito at the time of the seizure.* This earlier

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* The only discrepancy was that in the sidewalk statement, Vigorito had said that the alcohol came from a barrel "in a small room off of the office of the garage" (R. 13). Otherwise, the statement was completely consistent with the testimony.

explanation had been proved only for the purpose of contradicting it in one of its details. Neither the prior statement, nor the testimony given in contradiction, was disputed by the petitioners.

Nevertheless, its inconsistency in this one detail was urged upon the jury as presenting an issue of veracity between the petitioners and the Government agents. The petitioners sought correction of this improper argument, pointing out that there was no such issue. They contended that the attack upon their testimony because (in agreement with the prosecution witnesses) it contradicted the unsworn statement, was really a pretext for an improper exploitation of previous convictions for other offenses. The Trial Court refused to correct it, and the Circuit Court of Appeals has held it to be within the limits of proper argument.

On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners asserted that the judgment should be reversed on the ground that their proof had destroyed the presumption that their possession was guilty, and that in the final state of the evidence there was nothing to bring them within the statute; and upon the ground that argument of the prosecutor, above referred to, the failure of the Trial Court to correct it, and certain elements of the Trial Court's charge, violated the requirements of due process.

The Circuit Court of Appeals rendered its decision and filed its opinion herein on March 27, 1944. In affirming the judgment of conviction, it stated that the Trial Court's submission of the case to the jury was justified by the fact that it was a matter of affirmative defense for the petitioners to prove that their actions were within the statutory exception, and by the fact that the credibility of interested witnesses is always a question of fact for the jury. The prosecutor's argument that there was an issue of veracity, although the record shows no contradiction of any witness by any other witness, was characterized as being well

within the scope of permissible comment, and misstatement of the testimony in the Trial Court's charge was dismissed with the comment that proper objection had not been taken.

Petitioners herein filed a petition in the said Circuit Court of Appeals in due course, on April 11, 1944, praying for a rehearing. Thereafter, on May 23, 1944, the decision of the Circuit Court of Appeals was handed down, denying the petition for rehearing.

B

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 347 (a); Section 240 (a) of the Criminal Code, as amended by the Act of February 13, 1925; and Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

The Questions Presented Are:

1. Whether in the absence of any proof that the defendants had the alcohol in their possession for sale, and in the face of uncontradicted and unimpeached evidence to the contrary, the submission of the question to the jury was proper.

This involves a fundamental question as to the burden of proof in a criminal case, where the crime is defined in general terms, subject to exceptions separately stated. In such cases it is said that the exceptions are matters of affirmative defense; which necessarily implies that there is a rebuttable presumption that the exceptions do not apply. The question then is whether these cases follow the usual rule: that the production of evidence sufficient to challenge the presumption eliminates it from the case as an element

of proof, and casts upon the opposing side the burden of proving as a fact what was at first presumed.

It involves also a question of importance relating to the trial functions of judge and jury. The Circuit Court of Appeals upheld the submission of this issue to the jury, although the evidence to the contrary was uncontradicted and unimpeached. That putative issue was wholly inconsistent with all the facts in evidence. It was upheld upon the ground that the credibility of interested witnesses is always a question of fact for the jury. This Court has held to the contrary in civil suits, *Penn. RR. Co.* v. *Chamberlain,* 288 U. S. 333; *C. & O. Ry. Co.* v. *Martin,* 283 U. S. 209. Your petitioners believe that the present case squarely presents the question whether the rule is different in a criminal case; whether less proof is required to establish guilt beyond a reasonable doubt than to constitute a preponderance of evidence; whether speculation is a sufficient basis for conviction of a felony.

The mention of interested witnesses does not refer to the defendants, but to the witness Feoto, from whom the alcohol was obtained. He was a brother-in-law of one defendant. His testimony was contrary to interest to the extent that, if true, it subjects him to possible prosecution for prior possession of the same alcohol.

2. Whether the Circuit Court of Appeals for the Second Circuit is in error in its rejection of the doctrine that where proof of guilt depends upon circumstances, and where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the reviewing court to reverse a conviction.

3. Whether the argument of the prosecutor, the failure of the Trial Court to correct it, and the Trial Court's misstatement of the evidence, deprived the defendants of a fair trial.

D

Reasons Relied Upon for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Ezzard* v. *United States*, 7 F. (2) 808.

In the *Ezzard* case, a conviction for failure to register and pay a special tax as a dealer in narcotic drugs was reversed by a divided court. Under the statute there involved, possession of such drugs was presumptive evidence of a violation.

The prevailing opinion held that the statutory presumption merely dispensed with initial proof of the fact presumed. Evidence was produced to rebut the presumption. The evidence not being incredible on its face, and not being contradicted or met with any actual proof of the presumed fact, could not arbitrarily be ignored, and there was no issue to submit to the jury. The burden of proof never shifts from the prosecution.

The dissenting judge in the *Ezzard* case took the same position taken by the Court below, in the present case. It is said that the evidence of innocent possession came from an interested witness, and that the credibility of such testimony is always a question of fact for the jury. That this was intended literally is clear from the citation of *Wheeler* v. *United States*, 80 F. (2d) 678, decided in the Fifth Circuit.

But the Circuit Court of Appeals in the present case has gone further than either the *Wheeler* opinion or the dissenting opinion in the *Ezzard* case. It has applied the stated principle to the testimony, not of a defendant, but of a witness whose interest is apparently divided, and certainly remote. It seems impossible to reconcile this view with those expressed by the majority in the *Ezzard* case, and necessarily given effect in the decision of that case.

The decision below seems also to be in conflict with decisions of this Court which were relied upon in *Ezzard* v. *United States*. In *Penn R. R. Co.* v. *Chamberlain*, 288 U. S. 333, it was said in substance that an essential fact cannot be found upon the basis of presumption or inference, in the face of unimpeached and uncontroverted evidence to the contrary. In *C. & O. Ry.* v. *Martin*, 283 U. S. 209, the same principle was applied to a case in which the uncontradicted evidence was that of an interested witness. The proposition that such evidence must under all circumstances be submitted to the jury was explicitly rejected.

If the credibility of evidence rebutting a statutory presumption is always a question of fact, to be determined in favor of the defendant before the prosecution may be required to produce evidence supporting the presumption, then there is an absolute burden of proof upon the defendant. He may be convicted "even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense". *Tot* v. *United States*, 319 U. S. 463, 473 (concurring opinion). Such a construction of the statute suggests grave constitutional doubts with respect to the validity of the statute. *Linder* v. *United States*, 268 U. S. 5, 18. The question presented is one which has not been, but should be, decided by this Court.

In the exercise by this Court of its "judicial supervision of the administration of criminal justice in the Federal Courts" it should establish and maintain a "civilized standard" of evidence (*McNabb* v. *United States*, 318 U. S. 332). It is utterly repugnant to such a standard that the automatic discredit naturally applied by a jury to a defendant with a bad record (albeit for crimes wholly different from that charged in the instant case) should alone and unsupported be deemed sufficient to uphold a conviction. Consider the impossible predicament in which the decision below places a defendant: Unless he takes the stand, his guilt is presumed. If he does testify, his previous convictions are said to be enough to warrant disbelief by a jury

of the explanation which he alone, ordinarily, can offer. Thus the past alone is said to be enough to condemn, absent any proof of guilt or any evidence in contravention of the explanation of mere possession; not even shown to have been a knowing possession.

WHEREFORE petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated: New York, N. Y., June 21, 1944.

CONRAD MARINO,
GABRIEL VIGORITO,
Petitioners,

By J. BERTRAM WEGMAN,
Counsel for Petitioners.